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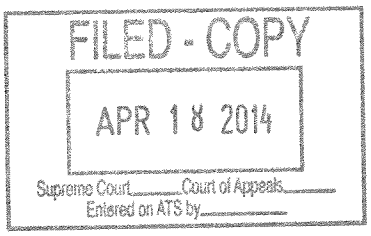
State v. Lemmons Respondent's Brief 1 Dckt. 41278

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Appellant-Cross Respondent, vs. BRYANN KRISTINE LEMMONS, Defendant-Respondent-Cross Appellant.	)	Supreme Court Nos. 41278, 41279 Twin Falls Co. Case Nos. CR-2011-14836, CR-2012-10131



RESPONDENT/CROSS-APPELLANT'S BRIEF ON APPEAL

On Appeal from the Fifth Judicial District, County of Twin Falls
Honorable Randy J. Stoker, presiding

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COURSE OF PROCEEDINGS

Bryann Kristine Lemmons (Lemmons) was charged in Twin Falls County Case No. CR-2011-0014836 on or about May 29, 2011, with two counts of Trafficking in Methamphetamine, I.C. §§ 37-2732B(a)(4)(A), 37-2732B(c), 18-204. (R. pp. 16-18.) Lemmons was also charged in Twin Falls County Case No. CR-2012-0010131 on or about September 7, 2012, with two counts of Conspiracy to Traffic in Methamphetamine, Felony, I.C. §§ 37-2732b(a)(4)(A), 37-2732B(c), 18-1701. (R., pp. 567-570.) It should be noted that these two separate cases stemmed from the same alleged acts contained in the Affidavit of Probable Cause in Support of Criminal Complaint/Citation. (R. pp. 19-27, 571-579.)

The two above-cited cases were consolidated and a jury trial was conducted on or about May 29-30, 2013, before the Honorable Randy J. Stoker. A jury verdict was returned on or about May 30, 2013, which found Lemmons to be guilty on all four (4) counts. The jury verdict included a statement that Lemmons represented that the methamphetamine weighed 28 grams or more. (R. pp. 380-381, 810-811.) That sentencing was scheduled for July 29, 2013, and a Pre-Sentence Investigation, Mental Health Examination and Substance Abuse Evaluation were ordered by the Court. (R. pp. 379, 401, 818-819, 823.)

Lemmons filed a Renewed Motion for Judgment of Acquittal and Motion for New Trial on or about June 13, 2013. (R. pp. 416-418, 838-840.) The State filed a Memorandum in Opposition to Defendant's Motion for Judgment of Acquittal and

Motion for New Trial, as well as a Supplemental Memorandum in Opposition, on or about June 24, 2013, and July 10, 2013, respectively. (R. pp. 422-444, 842-865.) Lemmons filed a Memorandum in Support of Defendant's Renewed Motion for Judgment of Acquittal and/or Motion for New Trial on or about July 12, 2013, (R. pp. 445-450, 866-871), as well as a Supplemental Memorandum in Support of Defendant's Renewed Motion for Judgment of Acquittal on or about July 15, 2013. (R. pp. 454-458, 875-879.) That a hearing was conducted relative to Lemmons' Renewed Motion for Judgment of Acquittal and Motion for New Trial on or about July 15, 2013, and the Court issued an Order Granting Motion for New Trial in Part, Denying Motion for New Trial in Part, and Denying Motion for Acquittal. (R. pp. 452-453, 873-874.) The matter was then rescheduled for pretrial conference and jury trial. (R. p. 459, 880.) The State filed a Notice of Appeal relative to the Court's Order Granting Motion for New Trial in Part, Denying Motion for New Trial in Part, and Denying Motion for Acquittal on or about July 24, 2013. (R. pp. 464-467, 885-888.)

Lemmons timely filed a Motion for Reconsideration and Memorandum in Support Thereof on or about July 25, 2013, (R. pp. 468-478, 889-899). Lemmons filed a Motion for Permissive Appeal and Memorandum in Support Thereof on or about July 29, 2013. (R. pp. 481-491, 902-912.) The State filed a Memorandum Opposing Defendant's Motion for Reconsideration on or about August 15, 2013. (R. pp. 506-513, 927-934.) On or about August 22, 2013, Lemmons filed a Final Memorandum in Support of Defendant's Renewed Judgment of Acquittal and Motion for New Trial and Dismissal. (R. pp. 514-531, 935-952.) That a hearing relative to Lemmons' Motion for

Reconsideration was conducted on or about August 23, 2013, and the Court entered an Order on Defendant's Motion for Reconsideration on or about August 26, 2013. (R. pp. 533-534, 954-955.) In the Court's Order, Lemmons was granted an acquittal on all four (4) counts of criminal conduct set forth in their respective Information(s), however, Lemmons remained convicted of the charges of Delivery, on the theory of a lesser included offense. (R. pp. 533-534, 954-955.) Lemmons timely filed a Notice of Cross-Appeal relative to Twin Falls County Case No. CR-2011-14836 on or about October 4, 2013. (R. pp. 538-541).

NATURE OF THE CASE

This is an appeal from the Order on Defendant's Motion for Reconsideration entered by the Honorable Randy J. Stoker on or about August 26, 2013, finding that Defendant's Motion for Acquittal as a matter of law as to Conspiracy to Traffic in Methamphetamine and the enhancement on each delivery charge *(trafficking)* is granted and Defendant's Motion for New Trial or Acquittal as to Delivering Methamphetamine is denied. [emphasis added.] Lemmons appeals the denial of her request for acquittal and/or new trial as to the two counts of Delivery, only.

STATEMENT OF FACTS

After a trial by jury, Lemmons was convicted of four (4) counts of criminal conduct. (R. pp. 380-381, 810-811.) Lemmons made a Motion for Judgment of Acquittal after the conclusion of the State's presentation of evidence, which was denied by the Court. (Trial Tr. p. 352, Ll. 11-12.) Lemmons filed a Renewed Motion for Judgment of Acquittal after the return of the jury verdict which was granted in part and

denied in part. (R. pp. 452-453, 873-874.) Finally, Lemmons filed a Motion for Reconsideration which ultimately led to the Court entering an acquittal as to the four (4) counts of criminal conduct contained in the Information(s). (R. pp. 533-534, 954-955.) Because the Court considered the crime of Trafficking to be Delivery with an enhancement, the Court determined that Lemmons would remain convicted of the lesser included offenses of Delivery. (Trial Tr. pp. 382-383, Reconsideration Tr. p. 37.)

The District Court based its decision to acquit on the fact that the State had failed to introduce evidence that one ounce was equal to or greater than 28 grams. (Reconsideration Tr. p. 37.) The only evidence introduced by the State in this regard was a statement of the Detective that one ounce was "approximately" 28 grams. (Trial Tr. p. 342, l. 4.)

Lemmons also requested a Ninth Circuit jury instruction relating to the credibility of informants. The District Court denied Lemmons' request on the basis that Idaho case law did not speak to that issue. (Trial Tr. pp. 384-385.)

Both the State and Lemmons appealed.

ISSUES ON APPEAL

(a) Whether or not the Court erred in failing to grant Lemmons' Motion for New Trial or Acquittal as to two (2) Counts of Delivery of Methamphetamines; and

(b) Whether or not Lemmons' Constitutional rights were violated by the Court's jury instructions and/or failure to include jury instructions.

ARGUMENT

Lemmons was charged with two counts of Trafficking in Methamphetamine, I.C. §§ 37-2732B(a)(4)(A), 37-2732B(c), 18-204, in Twin Falls County Case No. CR-2011-0014836 . (R. pp. 16-18.) Lemmons was also charged in Twin Falls County Case No. CR-2012-0010131, with two counts of Conspiracy to Traffic in Methamphetamine, Felony, I.C. §§ 37-2732b(a)(4)(A), 37-2732B(c), 18-1701. (R., pp. 567-570.) Both criminal cases were consolidated for the purposes of trial, therefore, the charges at issue in the trial total four (4) counts of criminal conduct as set forth in their respective Information(s).

At trial in this matter, counsel for Lemmons made a Motion for Judgment of Acquittal after the conclusion of the presentation of the State's case. (Trial Tr. p. 352, Ll. 11-12.) Counsel for Lemmons argued that the State could not meet one or more of the elements of the four (4) charges against Lemmons and, therefore, should be granted an acquittal. (Trial Tr. p. 355, Ll. 9-12.) The Court denied Lemmons' Motion at that time.

At the conclusion of the trial, the jury returned a verdict of guilty on all four (4) counts of criminal conduct. Lemmons filed a Renewed Motion for Judgment of Acquittal and Motion for New Trial on or about June 13, 2013. (R. pp. 416-418, 838-840.) After hearing on the Renewed Motion, the Court granted Lemmons request for a new trial in its Order Granting Motion for New Trial in Part, Denying Motion for New Trial in Part, and Denying Motion for Acquittal. (R. pp. 452-453, 873-874.) Lemmons filed a Motion for Reconsideration and Memorandum in Support Thereof on or about July 25, 2013, (R. pp. 468-478, 889-899.) The Court entered an Order on or about August 26, 2013, finding

that Defendant's Motion for Acquittal as a matter of law as to Conspiracy to Traffic in Methamphetamine and the enhancement on each delivery charge *(trafficking)* is granted and Defendant's Motion for New Trial or Acquittal as to Delivering Methamphetamine is denied. [emphasis added.]

The Order on Lemmons' Motion for Reconsideration is somewhat confusing in that the District Court treated the charge of Trafficking as an "enhancement" to the charge of Delivery. (Trial Tr. pp. 382-383.) While it may not be clear on its face, that Order effectively resulted in an acquittal of all four counts of criminal conduct set forth in their respective Information(s). However, given that the District Court treated the charge of Trafficking as Delivery with an enhancement, the District Court determined that Lemmons would remain convicted of two counts of Delivery of Methamphetamines, even though those charges were not contained in either of the Information(s).

Lemmons appeals only that part of the Order on Defendant's Motion for Reconsideration wherein Lemmons was denied an acquittal and/or new trial as to the two counts of Delivery, only. Lemmons specifically did not appeal that part of the Order which relates to acquittal of the charges contained in Twin Falls County Case No. CR-2012-001013.

The District Court erred in failing to grant Lemmons' Motion for New Trial or Acquittal as to two (2) Counts of Delivery of Methamphetamines

While Lemmons appreciates the State's tenacity by insisting that the District Court was wrong in finding "insufficient evidence to convict" Lemmons in the principal case, the fact that the District Court *may* or *may not* have been wrong is irrelevant. The

reason for this lies in the reading of *Evans v. Michigan,* 133 S.Ct. 1069 (2013), a case that is, quite frankly, overwhelming relevant because of its extraordinarily direct application to the issues in the principal case. The case is recent, (February 20, 2013), relevant (involves the same issues as the principal case), and specifically abrogates the Idaho Supreme Court case of *State v. Korsen*, 138 Idaho 706, 69 P.3d 126 (2003).

So, while the State insists that the jury *could* have concluded that an ounce of methamphetamines was more than 28 grams, the following citations show conclusively that whether they could or not, is absolutely and categorically irrelevant.

Consider the following:

> [O]ur cases have applied Fong Foo's principle broadly. An acquittal is unreviewable whether a judge directs a jury to return a verdict of acquittal, e.g., *Fong Foo*, 369 U.S., at 143, 82 S.Ct. 671, or forgoes that formality by entering a judgment of acquittal herself. See *Smith v. Massachusetts*, 543 U.S. 462, 467-468, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005) (collecting cases). *And an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence*, *Sanabria v. United States*, 437 U.S. 54, 68-69, 78, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978); *a mistaken understanding of what evidence would suffice to sustain a conviction, Smith*, 543 U.S., at 473, 125 S.Ct. 1129; *or a "misconstruction of the statute" defining the requirements to convict*, *Rumsey*, 467 U.S. at 203, 211 104 S.Ct. 2305; cf. *Smalis v. Pennsylvania*, 476 U.S. 140, 144-145, n. 7, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). In all these circumstances, "the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character." *United States v. Scott*, 437 U.S. 82, 98, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (internal quotation marks and citation omitted).

[emphasis added.]

. . .

> [O]ur cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an

offense. *See ibid.*, and n. 11; *Burks v. United States*, 437 U.S. 1, 10, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Thus an "acquittal" includes "a ruling by the court that the evidence is insufficient to convict," a "factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability," and any other "rulin[g] which relate[s] to the ultimate question of guilty or innocense." *Scott,* 437 U.S., at 91, 98, and n. 11, 98 S.Ct. 2187 (internal quotation marks omitted). These sorts of substantive rulings stand apart from procedural rulings that may also terminate a case midtrial, which we generally refer to as dismissals or mistrials. Procedural dismissals include rulings on questions that "are unrelated to factual guilty or innocense," but "which serve other purposes," including "a legal judgment that a defendant, although criminally culpable, may not be punished" because of some problem like an error with the indictment. *Id.*, at 98, and n. 11, 98 S.Ct. 2187.

Both procedural dismissal and substantive rulings result in an early end to trial, but we explained in *Scott* that double jeopardy consequences of each differ. "[T]he law attaches particular significance to an acquittal," so a merits-related ruling concludes proceedings absolutely. *Id.*, at 91, 98 S.Ct. 2187. This is because "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty,'" *Ibid.* (quoting *Green v. United States,* 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). And retrial following an acquittal would upset a defendant's expectation of repose, for it would subject him to additional "embarrassment, expense and ordeal" while "compelling him to live in a continuing state of anxiety and insecurity." *Id.*, at 187, 78 S.Ct. 221. In contrast, a "termination of the proceedings against [a defendant] on a basis unrelated to factual guilt or innocence of the offense of which he is accused," 437 U.S., at 98-99 S.Ct. 2187, i.e., some procedural ground, does not pose the same concerns, because no expectation of finality attaches to a properly granted mistrial.

...

"[I]t is plain that the [trial court] ... evaluated the [State's] evidence and determined that it was legally insufficient to sustain a conviction." *Martin Linen*, 430 U.S., at 572, 97 S.Ct. 1349. The trial court granted Evan's motion under a rule that requires the court to "direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction." *Mich. Rule Crim. Proc.*, 6.419(A) (2012). And the court's

> oral ruling leaves no doubt that it made its determination on the basis of "'[t]he testimony'" that the State had presented. 491 *Mich.*, at 8, 810 N.W.2d,m at 539. This ruling was not a dismissal on a procedural ground "unrelated to factual guilty or innocence," like the question of "preindictment delay" in *Scott,* but rather a determination that the State had failed to prove its case. 437 U.S., at 98, 99, 98 S.Ct. 2187. Under our precedents, then, Evans was acquitted.
>
> There is no question the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under State law. But that is of no moment. *Martin Linen, Sanabria, Rumsey, Smalis,* and *Smith* all instruct that an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence is "correct or not," *Martin Linen*, 430 U.S., at 571, 97 S.Ct. 1349, *and regardless of whether the court's decision flowed from an incorrect antecedent ruling of law.* Here Evans' acquittal was the product of an "erroneous interpretatio[n] of governing legal principals," but as in our other cases, that error affects only "the accuracy of [the] determination" to acquit, not "its essential character." *Scott*, 437 U.S., at 98, 98 S.Ct. 2187 (internal quotation marks omitted).

[emphasis added]

And, evidently it doesn't matter what *label* is used by the District Court, as indicated by the Court in *Evans* as follows:

> Our decision turns not on the form of the trial court's action, but rather whether it "serve[s]" substantive "purposes" or procedural ones. *Scott*, 437 U.S., at 98, n. 11, 98 S.Ct. 2187. If a trial court were to announce, midtrial, "The defendant shall be acquitted because he was prejudiced by preindictment delay," the Double Jeopardy Clause would pose no barrier to reprosecution, notwithstanding the "acquittal" label. Cf. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65. Here we know the trial court acquitted Evans, not because it incanted the word "acquit" (which it did not), but because it acted on its view that the prosecution had failed to prove its case.

In view of the recent *Evans* case (February, 2013), and its specific abrogating of *State v. Korsen*, 138 Idaho 706, 69 P.3d 126 (2003), Lemmons was entitled to an acquittal when the District Court ruled that the State's evidence was legally insufficient to sustain a

conviction. And, accordingly, the Double Jeopardy Clause would bar a retrial for the same offense. A Judgment of Acquittal should have issued.

The District Court specifically declined to take judicial notice of the number of grams in an ounce (Trial Tr. p. 347, Ll. 9-11), and the law is clear that facts not traditionally cognizable must be proved. *Holtz v. Babcock*, 143 Mont. 371, 390 P.2d 801, *Leahy v. Department of Revenue*, 266 Mont. 94, 879 P.2d 653 (1994). The State at trial merely made a verbal representation that one ounce was equal to 28.35 grams, (Trial Tr. p. 346, Ll. 24-25, p. 347, Ll. 1-19) but never presented evidence to that effect.

The only evidence presented at trial relative to the conversion of ounces to grams was a statement of Officer Sweezy who, in responding to the question, "how many grams are there in an ounce?" stated there were "approximately 28." (Trial Tr. p. 342, l. 4.) There simply was no other evidence offered regarding the number of grams of drugs involved in this case.

The question of whether the District Court's refusal to take judicial notice of the grams-to-ounces conversion tables was erroneous, i.e., was right or wrong, is irrelevant. According to *Evans v. Michigan,* 133 S.Ct. 1069 (2013), the only question in this regard is whether or not the District Court's acquittal was procedural or substantive. It is obvious from a reading of the transcript that the District Court determined that there was insufficient evidence to convict on all four counts. (Reconsideration Tr. p. 35, Ll. 2-7.) As such, according to *Evans*, the District Court made a "merits" based or substantive ruling. The holding of the *Evans* Court is as follows: "[w]e hold that Evans' trial ended in an acquittal when the trial court ruled the state had failed to produce sufficient

evidence of his guilt. The Double Jeopardy Clause thus bars retrial for his offense and should have barred the state's appeal." *Evans v. Michigan*, 133 S.Ct. 1069 (2013). Lemmons believes that the law is clear in that the question of whether or not the Court wrongfully or rightfully took judicial notice is irrelevant in this proceeding. The only question in this regard is whether or not the acquittal was substantive or procedural. Should this Court find that the acquittal was substantive or "merits" based, there need not be any further discussion about the District Court's decision as the State should be barred from their appeal as set forth in *Evans*. However, in an exercise in futility, Lemmons sets forth the following case law in support of the District Court granting an acquittal.

The Court did what it did and thereby set the standard regarding which party had what burden of proof and, more importantly, what evidence had to be produced to convict Lemmons. In other words, right or wrong, the rules were laid down by the Court, and in order for the jury to convict Lemmons, the State had to prove that there was 28.35 grams in an ounce. All that was proven by the State was that there were "approximately" 28 grams in an ounce, which is not sufficient to support a conviction because the State did not prove a major element of this crime beyond a reasonable doubt. "28 grams or more" would be beyond a reasonable doubt. *Approximately* 28 grams is not. And, certainly the State's representation to the jury in his closing argument that the Officer had testified that there were "more than 28 grams in an ounce", is not only erroneous, but improper, and creates an *impermissible influence* on the jury requiring an acquittal and/or new trial. (Trial Tr. p. 411, Ll. 6-8.)

It should be noted that the law in most jurisdictions follows the rule that it is

discretionary with the Trial Court whether it will take judicial notice of well-established patterns of fact, usually depending upon the nature of the subject matter, the issue involved, the apparent justice, and the circumstances of the particular case. *Brough v. Ute Stampede Ass'n.*, 105 Utah 446, 142 P.2d 670 (1943).

The test of whether a court will take judicial notice of a fact is whether sufficient notoriety will attach to the fact, and if there is any doubt either as to the fact itself or as to it being a matter of common knowledge, evidence will be required. *Ecco High Frequency Corp. v. Amtorg Trading Corp.*, 81 N.Y.S.2d. 610 (1948).

Therefore, by the jury in this case convicting Lemmons, the jury must have considered information that was not properly presented at trial, i.e., pursuant to the Idaho Rules of Evidence.

Idaho Rule of Evidence 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. "A court must take judicial notice if requested by a party and supplied with the necessary information." *Idaho Rule of Evidence 201(b)*, *Newman v. State*, 149 Idaho 225, 227 (Ct.App. 2010). As further evidence that the conversion of an ounce into grams is not well known or universally accepted, the State of Idaho, introduced evidence, at hearing, on the Renewed Motion for Judgment of Acquittal asking the Court to take judicial notice of a packet of "Tic Tacs". Counsel for Lemmons pointed out that the "Tic Tacs" identify that the contents weigh one ounce, however, on the label of said "Tic Tacs", it claims that the

conversion of one ounce is 29 grams, which we all know to be incorrect. (Trial Tr. p. 460, Ll. 4-16.)

In the instant case, the District Court denied the State's request to take judicial notice of the conversion of one ounce into grams. As such, it can only be assumed that the information that is sought to be taken notice of is information that is not generally known within the territorial jurisdiction of the court, and/or was not capable of accurate and ready determination. Further, documents generally should be placed into evidence through ordinary avenues. *Newman v. State*, 149 Idaho 225, 227 (Ct.App. 2010). This is done by laying an appropriate foundation to demonstrate the documents authenticity and relevance. (See Idaho Rule of Evidence 901 and 902.) The State failed to introduce any evidence in support of their requested judicial notice.

Of course, the above discussion of the judicial notice issue is probably irrelevant because of the *Evans* Court's position that an acquittal due to insufficient evidence precludes retrial "regardless of whether the Court's decision flowed from an incorrect antecedent ruling of law." *Evans v. Michigan*, 133 S.Ct. 1069, 1076 (2013).

Therefore, for all of the reasons set forth above, it appears more than obvious that Lemmons is entitled to an acquittal of the charge(s) contained in the respective Information(s).

The Court erred in failing to grant an acquittal to Lemmons on two counts of Delivery of Methamphetamines.

Lemmons' position with regards to the charge(s) of Delivery is that they should have been, and still should be, dismissed by the Court. Lemmons first request is that she

be granted an acquittal on the charges of Delivery. In the alternative, Lemmons requests that she be granted a new trial. While Lemmons alternative request for relief is a new trial on the charges of Delivery, Lemmons asserts that should the Court vacate the conviction and wish to reset a trial, that in reality, by vacating the conviction, Lemmons is actually granted an acquittal by virtue of Idaho Code Section 19-1719, which states as follows:

> 19-1719. CONVICTION OR ACQUITTAL BARS INCLUDED OFFENSES. When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment, the conviction, acquittal or jeopardy is a bar to another indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense included therein, of which he might have been convicted under that indictment.

It is clear from the record that Lemmons made a Motion for Judgment of Acquittal at the conclusion of the presentation of the State's evidence. It is also clear that Lemmons *renewed* her Motion for Judgment of Acquittal following the jury's verdict of guilt. As such, Lemmons' Motion should clearly have been granted when it was first made during trial. Had the District Court made the "proper" decision during trial, Lemmons would have been granted an acquittal at that time thereby preventing any discussion of jury instructions or lesser included offenses.

In the alternative, Lemmons seeks a new trial as to the two counts of Delivery on the basis that the District Court failed to grant Lemmons her requested jury instruction relating to the credibility of the informant(s).

Lemmons' Constitutional rights were violated by the Court's jury instructions and/or failure to include jury instructions.

First of all, the District Court in trying the case refused to give a requested

informant instruction based on the fact that Idaho State law did not require same, despite Ninth Circuit law requiring such an instruction if requested.

It is clear that under the Constitution's Supremacy Clause, U.S. CONST. art. VI, cl. 2, federal legislation enacted pursuant to constitutionally derived federal authority trumps a conflicting state law, even if the state law furthers a court police power interest. *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). "(The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail").

However, in the principal case, there actually isn't any conflicting law involved. There just isn't any state law requiring such an instruction. Based upon that fact, i.e., the absence of state law, the Court in this case refused to follow Ninth Circuit law and give the requested instruction. It is Lemmons' position that said refusal violated Lemmons' rights to due process. Consider the following cases.

In *U.S. v. Monzon-Valenzuela*, 186 F.3d 1181 (9th Cir. 1999) "the informant instruction applies only to witnesses "who provide evidence against a defendant for some personal advantage or vindication, as well as for pay or immunity."

In *U.S. v. Cuellar*, 96 F.3d 1179 (9th Cir. 1996). The defendant in this case argued that the district court erred in denying his motion to dismiss the indictment for outrageous government conduct because Garavito was paid a "contingent" fee that was dependant upon the amount of drugs involved and upon whether Cuellar was convicted. In his argument he pointed out that the Fifth Circuit held that an informant paid a contingent fee is not a competent witness and that a conviction based on said testimony must be

reversed. *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962).

Despite the fact that the *Williamson* case was overruled in terms of "per se exclusion", the Court in *Williamson* stressed the danger to the criminal justice system that exist with the use of paid informants. The Court specifically stated as follows:

> We, and other courts as well, have consistently held that the government is not precluded from using informants before or during trial simply because an informant may have a motive to falsify testimony or to entrap innocent persons. Indeed, the Supreme Court dealt with the issue in *Hoffa v. United States*, 385 U.S. 293 (1966), and resolved it against Cuellar's position here. While the Chief Justice in dissent would have foreclosed prosecution based on what he thought was a particularly unsavory use of an informant, the majority held that regardless of the fact that Hoffa's informant may have had more of a motive to lie than most, it does not follow that his testimony was untrue, not does it follow that his testimony was constitutionally inadmissible. The established safeguards of he Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. At the trial of this case, [the informant] was subject to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored. The trial judge instructed the jury, both specifically and generally with regard to assessing [the informant's] credibility. The Constitution does not require us to upset the jury's verdict.

The important point here is that the *Cuellar* case indicates that the informant's testimony was constitutionally admissible and as long as the veracity of the witness was tested by cross-examination and *the credibility of the testimony was determined by proper instructions to the jury.* [emphasis added.]

In the principal case, no such instruction was given despite its request by the defense. Therefore, Lemmons' right to due process was violated.

In addition, it is worth noting that neither the State nor Lemmons requested the lesser included offense of Delivery. (Trial Tr. p. 381, Ll. 13-24.) In a traditional

trafficking case, the delivery and representation as to quantity occur at the same time. In those types of cases, where the quantity of drugs delivered is 28 grams or more, there is no need to determine whether or not a delivery and a representation have been made. Unlike the traditional trafficking cases, this case involved a form of trafficking that apparently had not been contemplated by the Idaho Jury Instructions. Therefore, Lemmons believes that the jury instructions were correct, however, neither the State nor Lemmons requested Delivery as a lesser included offense and, as such, the Court should be barred from considering Delivery to be a lesser included offense. *State v. Anderson,* 82 Idaho 293, 352 P.2d 972 (1960).

To sum up this particular issue, the Court's refusal to give the Informant Instruction requested by Lemmons is fundamental error as it violated Lemmons' right to due process and Lemmons is entitled to a new trial on the charge(s) of Delivery.

The second issue supporting Lemmons' Motion for Retrial on Delivery charge(s) is a little more sensitive and involves the fact that the State, in its closing argument, indicated to the jury a fact not in evidence, i.e., indicated that his witness had represented that an ounce was "more than 28 grams" when, in fact, the witness had only indicated that an ounce was "approximately 28 grams". This was a clear misrepresentation of the evidence in the case and clearly amounted to an improper closing argument by the Prosecuting Attorney.

The fact is there is no rule of trial practice more universally accepted and applied than the rule that counsel may not introduce into his argument to the jury statements unsupported by evidence produced on the trial and made not as expressions of belief or

proof, but as assertions of fact. *State v. Gauger*, 200 Kan. 515, 438 P.2d 455, *In Re: Care and Treatment of Ontiberos*, 295 Kan. 10, 287 P.3d 855 (2012).

Further, in *State v. Garcia*, 100 Idaho 108, 594 P.2d 146 (1979), it was held that improper closing argument by the prosecuting attorney constituted "fundamental error" and was therefore reviewable on appeal notwithstanding the fact that no objection had been made by defense counsel during the trial.

The fact is that in the principal case, objection was made to the jury by defense counsel to the misstatements of the evidence by the State.

And, finally, although it is not Lemmons' belief or assertion that the State in this case *intentionally* made these misrepresentations, it is noteworthy that the ABA Standards on Criminal Justice look very unfavorably upon situations such as this. Consider the following:

> **Standard 3-5.8 Argument to the Jury**
>
> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth of falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

- - -

Standard 3-5.9 Facts Outside the Record

> The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge on ordinary human experience or matters of which the court may take judicial notice.

Based on the above citations, and specifically *State v. Garcia*, it is Lemmons' belief that the actions on the part of the State in misrepresenting facts not in evidence to the jury, violated Lemmons' right to due process and demand a retrial on the charge of Delivery, if not an acquittal.

Of course, the relevant and critical issue here is whether the State's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Darden v. Waynewright*, 477 U.S. 168, 106 S.Ct. 2464, L.Ed.2d 144 (1986). In applying the harmless error rule, the Idaho Courts have held that where the admissible evidence provides, beyond a reasonable doubt, "overwhelming and conclusive" proof of defendant's guilt, the admission of tainted evidence will be held to be harmless. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 78 L.Ed.2d 705 (1967).

However, in the principal case, the State's misrepresentations could hardly be considered harmless error wherein that was the only source of evidence that one ounce equals "more than 28 grams" throughout the entire trial. In other words, that statement by the State in its closing argument can be the only source from which the jury determined that there were "28 grams or more" of narcotics involved thereby completely eliminating the possibility of the State's misstatements amounting to harmless error.

The State will, in all likelihood, try to bifurcate the effect on the jury of the State's

comments, i.e., a misstatement of the evidence showing that there were "28 grams or more" that the State made to the jury only applied to the charge of Trafficking, and not Delivery. Actually, that is not so. Consider the following case:

In *U.S. v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), the Court stated as follows:

> Prosecutorial Misconduct
>
> Analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect (see, e.g., United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir. 1988)). We must therefore determine at the outset whether the prosecutor made improper statements during the course of the trial, after which we will turn to the effect of any such misconduct.
>
> As to the threshold issue of impropriety, we conclude that prosecutorial misconduct was clearly involved, both (1) because the prosecutor vouched for the credibility of witnesses and (2) because he also made arguments designed to encourage the jury to convict in order to alleviate social problems.
>
> . . .
>
> Where defense counsel objects at trial to acts of alleged prosecutorial misconduct, we review for harmless error on defendant's appeal; absent such an objection, we review under the more deferential plain error standard.
>
> Weatherspoon raised objections at trial to some but not all of the statements that he now challenges as improper. Even so, he argues that a harmless error analysis should be applied to the entirety of his appeal because his failures to object were attributable to the district court's demonstrated unwillingness to entertain his objections. But we need not venture into that fray, because the misconduct at issue here requires reversal even under the more restrictive plain error standard, under which reversal is appropriate "only if the prosecutor's improper conduct so affected the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived [Weatherspoon] of a fair trial" (Smith, 962 F.2d at 935). And to that end we must review the potential for

> prejudicial effect in the context of the entire trial (Young, 470 U.S. at 16, 105 S.Ct. 1038).
>
> . . .
>
> Because of these hazards to a fair trial, case law has condemned both (1) personal vouching by a prosecutor for the credibility of the government's witnesses, and (2) the expression by a prosecutor of the prosecutor's personal opinion as to the guilt of the accused, but only when remarks either "say [or] insinuate that the statement was based on personal knowledge *or on anything other than the testimony of those witnesses* given before the jury." Lawn v. United States, 355 U.S. 339, 359 n. 15, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). To quote the old Fifth Circuit, "The test as to whether the prosecutor has expressed an improper opinion is 'whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor' relied." United States v. Prince, 515 F.2d 564, 566 (5th Cir. 1975). Both practices tend to override the important role of jurors in our system by drawing them away from their sworn duty to focus only on the evidence in the record and the law.
>
> . . .
>
> Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding. Instead, as Lawn teaches, the remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error.

[Emphasis added.]

In applying the above-cited law to our case, there is no question that the State made improper statements to the jury in indicating to them that the State's witness had testified that there were "more than 28 grams in an ounce" because the State's witness never said that. That evidence, which was not presented at trial, goes to the very element that was necessary to prove the charge, i.e., that there were "more than 28 grams" of substance involved. So, that statement was improper.

As to the question as to whether it had any affect on the outcome of the verdict, the matter simply speaks for itself. The place that evidence came from was from the State during closing argument and it is obvious that it has affected the jury because it was a unanimous verdict that there had been "more than 28 grams". Therefore, it is, *ipso facto,* a tainted verdict.

Now comes the real "kicker" in this case. It would appear from the above citations, that Lemmons is at least entitled to a new trial on the charge(s) of Delivery. However, Idaho Code Section 19-1719 indicates otherwise. Consider the following:

> 19-1719. CONVICTION OR ACQUITTAL BARS INCLUDED OFFENSES.
>
> When the defendant is convicted or acquitted, or has once been placed in jeopardy upon an indictment, the conviction, acquittal or jeopardy is a bar to another indictment for the offense charged in the former, or for an attempt to commit the same, or for an offense included therein, of which he might have been convicted under that indictment.

The long and short of this is that since Delivery was a lesser included offense of the charge of Trafficking, and Lemmons should be acquitted of the charge(s), because of *Evans* and other cited cases, Lemmons cannot be retried for Delivery. Putting it another way, the acquittal on the Trafficking charge(s) amounts to res judicata creating a situation whereby the State is collaterally estopped from reprosecuting Lemmons. And, therefore, not only is Lemmons entitled to an acquittal of the charge(s) of Trafficking and Conspiracy to Traffic, she is also entitled to a dismissal of the Delivery charge(s) on the basis of res judicata and collateral estoppel. *Hard v. Burlington*, 87 F.2d 1454 (9th Cir. 1989), *Dardon v. Waynewright*, 497 U.S. 168 (1986), *Chapman v. California*, 386 U.S.

18 (1967). Also, see *State v. Byington*, 139 Idaho 516, 81 P.3d 421 (2003) wherein the Court states as follows:

> Where a defendant has sought and obtained reversal of a conviction on grounds other than the insufficiency of the evidence, double jeopardy principles do not prevent a second trial. Price v. Georgia, 398 U.S. 323 (1970); State v. Avelar, 124 Idaho 317, 321 n. 2, 859 P.2d 353, 357 n. 2 (Ct.App. 1993). Byington's specific circumstance, where a prior conviction was reversed due to the failure of the charging document to allege all the elements of the offense, was addressed by the United States Supreme Court in Ball v. United States, 163 U.S. 662 (1896). In that case, three defendants were charged with murder. At a jury trial, two defendants were found guilty and the third was acquitted. On the appeal of the convicted defendants, the Supreme Court held that the indictment by which they were charged was fatally defective for failing to allege either the time or place of the victim's death, and the Court therefore reversed the judgments of conviction. Another indictment was then obtained against all three defendants, each of whom raised a plea of former jeopardy. Those pleas were overruled by the trial court, and the three defendants were tried and found guilty. The matter was again appealed to the Supreme Court. As to the defendant who had been acquitted in the first trial, the Court held that the verdict of acquittal was a bar to a second indictment for the same killing, notwithstanding the jurisdictional flaw in the indictment. As to the other two defendants, however, the Court held that a second prosecution was permissible. The Court stated, "[I]t is quite clear that a defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." Id. at 672. In Bullington v. Missouri, 451 U.S. 430 (1981), the Supreme Court explained the rationale for the principle that a reversal of a conviction on grounds *other than insufficiency of the evidence* does not prevent reprosecution: "This rule rests on the premise that the original conviction has been nullified and `the slate wiped clean.'" Id. at 442 (quoting Pearce, 395 U.S. at 721). It is thus apparent that the Fifth Amendment presents no bar to Byington's second prosecution.

[emphasis added.]

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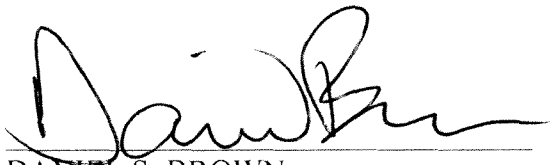
- - -

CONCLUSION

In conclusion, Lemmons requests that the State's appeal be dismissed and that they take nothing thereby. Lemmons also requests that she be granted an acquittal as to the two counts of Delivery of Methamphetamines. In the alternative, Lemmons requests that she be granted a new trial as to the two counts of Delivery of Methamphetamines.

DATED This 15th day of April 2014..

FULLER LAW OFFICES



DANIEL S. BROWN
Attorney for Cross-Appellant

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 15 day of April, 2014, I caused two true and correct copies of the foregoing document to be mailed, United States Mail, postage pre-paid, to the following:

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